



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case no 4107180/2019**

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**Held at Inverness on 10 October 2019**

**Employment Judge: W A Meiklejohn**

10 **Mr Sergio Sabato**

**Claimant  
In person**

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**Highland Health Board**

**Respondent  
Represented by  
Mr D James, Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that –

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(i) the respondent made unlawful deductions from wages due to the claimant, and

(ii) the respondent is ordered to pay to the claimant the sum of TWO THOUSAND AND FORTY-SIX POUNDS AND NINETY-FIVE PENCE (£2046.95).

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### **REASONS**

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1. The claimant contended that, in the circumstances described below, the respondent made unlawful deductions from wages due to him. The respondent accepted that there had been unlawful deductions but disputed the amount of these.

**Applicable law  
E.T. Z4 (WR)**

2. Section 13 of the Employment Rights Act 1996 (“ERA”) provides as follows

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5 “(1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

10 (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

3. Section 23 ERA provides as follows –

15 “(1) A worker may present a complaint to an employment tribunal –

(a) that his employer has made a deduction from his wages in contravention of section 13....

20 (4A) An employment tribunal is not....to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.”

4. Regulation 14 of the National Minimum Wage Regulations 2015 (“NMW Regs”) provides as follows –

25 “(1) The amount of any deduction the employer is entitled to make, or payment the employer is entitled to receive from the worker, as respects the provision of living accommodation by the employer to the worker in the pay reference period....is treated as a reduction to the extent that it exceeds the amount determined in accordance with regulation 16....”

35 5. Regulation 16(1) specifies the way in which the maximum amount that can be deducted from a worker’s wages for the provision of living accommodation is calculated, by reference to a daily amount multiplied by the number of days in the pay reference period for which accommodation was provided. For example, in the year commencing 1 April 2018, the maximum amount was £7 per day, equating to £49 in a pay reference period of one week.

40 **Preliminary matters**

- 5 6. Mr James raised two points. The first related to a statement from the claimant contained within his bundle of documents. The claimant confirmed that this was not intended to amend his claim in any way but simply set out in writing the evidence in chief he wished to present to the Tribunal. Mr James was content with that.
- 10 7. The second point related to the extent of the claim. The claimant accepted that the effect of section 23(4A) ERA was that he could claim only in respect of deductions from wages made by the respondent within the period of two years up to the date he had presented his claim, which was on 4 June 2019.
- 15 8. The claimant complained that he had asked the respondent for a list of their witnesses and this had not been provided. While this was unfortunate, I did not believe there was any material prejudice to the claimant.

### **Evidence**

- 20 9. I decided that it would be helpful to hear from the respondent's witnesses first so that evidence could be led about a National Minimum Wage refund paid by the respondent to the claimant. These witnesses were Mr K Colclough, HR Performance and Systems Manager, and Ms M Melrose, Accommodation Manager at Raigmore Hospital. I then heard evidence from the claimant.
- 25 10. I had bundles of documents from both parties. I will refer to these by page number, prefixed by "C" in the case of the claimant's documents and by "R" in the case of the respondent's documents.

### **Findings in fact**

- 30 11. I found the following material facts to be established by the evidence or to be agreed. Parties should note that it is not the function of the Tribunal to record every item of evidence presented to it and I have not attempted to do so.

12. The claimant entered the employment of the respondent on or around 24 November 2003 as a cleaner. He worked 15 hours per week. He was paid weekly.

5 13. On or around 1 June 2004 the claimant began to live in accommodation at Raigmore Hospital provided by the respondent. The respondent has a range of types of accommodation at Raigmore for staff and patients, administered by the department in which Ms Melrose works.

10 14. In the case of staff who occupy this accommodation, recovery of rent is dealt with by the respondent's payroll department for which Mr Colclough has management responsibility. The normal procedure, at least until May 2019, was that (a) in the case of staff who were paid monthly there would be a monthly deduction from salary for rent and (b) in the case of staff who were  
15 paid weekly there would be a weekly deduction from salary for rent.

15. The claimant had an issue about the rent charged to weekly paid staff being greater than that charged to monthly paid staff, both historically and currently. Ms Melrose said that the rents charged weekly and monthly were almost  
20 (although not exactly) identical. This was not a matter which I required to determine.

25 16. Both bundles contained a document headed "accommodation mandate" dated 1 June 2004 (C125/R36) which provided as follows –

*"I authorise for the amounts shown below, to be deducted from my salary by NHS Highland in respect of accommodation charges*

*Rent & Furnishing:- £174.90"*

30 The document also provided for a deduction to cover "Council Tax & Water" but this was not relevant for the purpose of these proceedings. The document did not specify what period the said sum of £174.90 covered but it was  
35 accepted in evidence that this would have represented a month's rent in 2004.

17. This document had been signed and the signature appeared to be the claimant's. It was similar to his signature on other documents including a Superannuation Scheme election form dated 23 November 2003 (R31), a Bank/Building Society Mandate dated 23 November 2003 (R32), a Contract of Employment Statement dated 24 November 2004 (at R34) and a further Bank/Building Society Mandate dated 31 January 2004 (R35).

18. The claimant's position was that he had not received any paperwork when he took up occupation of his accommodation at Raigmore and had no recollection of signing the accommodation mandate (C125/R36). He had been surprised when an amount in respect of rent was deducted from his pay on 6 June 2004 and 13 June 2004 (the payslips being C39 and C40). He had queried this with staff at the accommodation department and had been told that payments were always made by payroll deduction.

19. I found that the signature on the accommodation mandate was the claimant's and that the mandate was what it purported to be, that is an authorisation for deduction from salary of £174.90 (in respect of rent and furnishing) for accommodation charges. The similarity between the signature on this document and the signatures on the documents referred to in paragraph 17 above persuaded me that, on the balance of probability, the claimant had signed the accommodation mandate.

20. The claimant argued that the accommodation mandate was a photocopy and suggested that it might have been falsified. There was no evidence to support this and I found no reason to doubt that the mandate, which had been found within the respondent's payroll department, was a copy of what the claimant had signed in 2004.

21. In January 2018 HM Revenue & Customs ("HMRC") commenced a National Minimum Wage ("NMW") investigation which involved a check of the respondent's records to ensure their workers were receiving NMW. When, as part of this exercise, HMRC wrote to the respondent on 13 March 2018

(R40-43) they raised two cases where the respondent's accommodation charges exceeded the accommodation offset provided for in regulation 14 of the NMW Regs with the result that the employees concerned were receiving less than NMW. One of these was the claimant.

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22. Mr Colclough wrote to the claimant on 23 May 2019 (R44-45) to advise that the method of recovery of accommodation charges was to change so that, with effect from 10 July 2019, payment would be required monthly in arrears by direct debit instead of deduction from salary.

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23. Mr Colclough wrote to the claimant again on 29 July 2019 (R46) to advise that, as an outcome of the HMRC NMW compliance audit, he would on 1 August 2019 receive a payment representing underpayment of NMW. Mr Colclough said that this payment had been in the region of £4000 and he agreed with Mr James' calculation that the proportion of this which related to the period of two years ending on 4 June 2019 (the date of presentation of the claim in this case) was £1232.73.

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24. The claimant confirmed that he had received the NMW underpayment and accepted Mr James' calculation of the proportion which related to the relevant period of two years for the purposes of section 23(4A) ERA.

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25. The parties were agreed that the total deductions from the claimant's salary for accommodation made by the respondent in the said relevant period amounted to £7465.78. The claimant accepted that he should give credit for the said sum of £1232.73 so that his unlawful deduction claim was for £6233.05.

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26. The respondent's position was that £4186.10 of the alleged unlawful deductions had been authorised by the accommodation mandate signed by the claimant so that only the balance of £2046.95 fell to be treated as an unlawful deduction. They arrived at the figure of £4186.10 by starting with an amount of £174.90 per month, converting this to a weekly equivalent of

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£40.2509, then multiplying this by 104 being the number of weeks in the relevant period of two years.

### Submissions

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27. Both Mr James and the claimant provided written submissions and as these are available within the case file I will not repeat them here.

### Discussion and disposal

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28. Having decided as a finding in fact that the claimant had signed the accommodation mandate (C125/R36) the question I had to determine was whether this mandate did authorise the respondent to deduct £4186.10 from the claimant's pay.

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29. The claimant sought to persuade me that the mandate authorised only a single payment of £174.90. I did not accept this. Although the mandate does not specify the period to which the sum of £174.90 relates, it was accepted in evidence that this would have equated to a month's rent in 2004. The claimant did not suggest that he had agreed to occupy the accommodation for a period of only one month and, in any event, there would have been no need for a mandate if only a single payment was to be covered. I was satisfied that the mandate was intended to cover ongoing accommodation charges.

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30. In terms of section 13 ERA a deduction made by the respondent from the claimant's salary would not be unauthorised unless the claimant had "*previously signified in writing his agreement or consent to the making of the deduction*".

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31. The mandate clearly could not authorise deduction of more than the amount stated in it, hence the respondent's acceptance that the difference between the amount of £174.90 per month and the actual amount of accommodation charges deducted from the claimant's salary in the relevant period of two years was unlawful.

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32. A potential difficulty for the respondent was that they had not in fact made deductions from the claimant's salary in accordance with the precise terms of the mandate. They had instead initially deducted £40.25 per week (see C40) and thereafter had increased the deductions to reflect increases in rent.

33. At no time had the respondent made a deduction of exactly £174.90 from a payment of salary to the claimant. As Mr Colclough accepted, it would not have been feasible to do so. The claimant's weekly pay had been less than £174.90 throughout his period of occupancy of the accommodation.

34. Accordingly, on a narrow interpretation of the mandate, it did not authorise the actual deductions which the respondent had made. However, I did not consider that it was appropriate to give the mandate such a narrow interpretation.

35. I believed that it was relevant to look at the circumstances in which the mandate was provided by the claimant to the respondent. The context was the provision of rented accommodation which the claimant was to occupy for more than one month (otherwise, as stated above, a mandate would not have been needed). The claimant was expecting to pay and the respondent was expecting to receive the rent for the period of occupation. The method of payment contemplated by the parties was deduction from salary.

36. Looking at matters in this broader way, I considered that the mandate did constitute the claimant's authorisation to the respondent to make the weekly deductions from his salary for rent which they had proceeded to make, up to a total of £174.90 per month, so that only the excess over this figure was unauthorised. In circumstances where the claimant was paid weekly, deduction of weekly instalments of rent up to the stated monthly amount was a reasonable exercise by the respondent of the authorisation given by the claimant.



37. It followed that the respondent did have the claimant's authorisation to deduct sums totalling £4186.10 from his salary during the relevant period of two years ending on 4 June 2019. Taking into account the payment by the respondent to the claimant of the NMW underpayment of £1232.73 referable to this period, only £2046.95 of the total deductions of £7465.78 was unauthorised and I decided that the respondent should be ordered to pay this amount to the claimant.

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<b>Employment Judge:</b>	<b>Alexander Meiklejohn</b>
<b>Date of Judgment:</b>	<b>15 October 2019</b>
<b>Date sent to Parties:</b>	<b>17 October 2019</b>